DOCUMENT RESUME

ED 271 381 SO 017 353

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TITLE	To Make and to Alter Their Constitutions of Government: Article V and Amendment by Convention. A Guide for Discussion of the Implications of Calling a National Constitutional Convention.
INSTITUTION	Jefferson Foundation, Washington, DC.
PUB DATE	84
NOTE	20p.; For other guides in this series, see SO 017 351-358. Document contains light type.
AVAILABLE FROM	The Jefferson Foundation, 1529 18th Street, NW, Washington, DC 20036 ($1.00).
PUB TYPE	Guides - Classroom Use - Guides (For Teachers) (052)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	*Constitutional History; Constitutional Law; Educational Resources; Governmental Structure; Government Role; Instructional Materials; Political Science; Secondary Education; Teaching Guides; United States Government (Course)

ABSTRACT

A discussion guide, one in a series on constitutional reform issues developed by The Jefferson Foundation as part of The Jefferson Meeting on the Constitution project, examines the implications for calling a National Constitutional Convention. The controversy over the power of the amending convention is explained through tracing its development in the American revolutionary and constitutional traditions. The second section, "The Convention and Stability," emphasizes the founder's inclusion of an amendment provision as a reaction to the inflexibility of the Articles of Confederation. The third section discusses the genesis of Article V. Examples of state constitutional conventions are also included. The historical precedents of conventions are listed. The document concludes by discussing several bills introduced by Congress to set rules, regulations, and procedures for a national convention, specifically Senator Sam Irvin's in 1981 or Senator Orrin Hatch's in 1979. (RLS)

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"TO MAKE AND TO ALTER THEIR CONSTITUTIONS OF GOVERNMENT"

Article V and Amendment by Convention

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A Guide for Discussion of the Implications of Calling a National Constitutional Convention

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Library of Congress Catalog Card No. 84-181175

The reproduction and distribution of this booklet for use at the Virginia Jefferson Meeting is made possible by a grant from the Virginia Foundation for the Humanities and Public Policy.

Constitutional conventions played a singular role in the creation of American government. Americans held the first national assembly to determine the fundamental law of the land. Nowhere since then has the right been so steadfastly upheld or, as the number of state constitutional assemblies shows, so frequently practiced.

The principle of popular consent to government dates back to colonial days. With their declaration of independence from Great Britain, the colonists claimed the additional right to make their own laws, and exercised it in the revolutionary state constitutional conventions. The Philadelphia Convention and the ratifying bodies of 1787–89 officially recognized the convention as a basic tenet of American republicanism. The founding generation thereby established a tradition that has been as much a source of fear and controversy as it has been a symbol of liberty.

The convention has historically been the expression of the people's right to create their own governing authority and to consent actively to that authority. It is also one way to make fundamental changes in the government. In addition to giving Congress the power to propose amendments, Article V of the Constitution says that Congress shall call a convention for the purpose of amending the Constitution whenever two-thirds of the states request it. The right has never been exercised even though Congress has received over 300 petitions calling for a national convention.

The prospect of a national amending convention is frightening to some, remote to others and unknown to many people. But reform groups throughout history have looked to Article V for the key to constructive change. Today supporters of the balanced budget amendment have succeeded in making a second Constitutional convention too imminent to ignore. Already thirty-two of the required thirty-four states have petitioned Congress to call a convention to consider an amendment requiring a balanced federal budget.

Amending the Constitution by convention is a much larger issue than the budget. As a fundamental right it is always relevant. But realizing it in practical terms has been elusive because it is not entirely clear what the founders intended when they included the convention method in the amendment clause. The unanswered questions arouse debate over the very principles of the Union. Does Article V give the people the power to rewrite the fundamental law of the land? Or does the supremacy of the Constitution prevent an amending convention from changing it completely? What is actually the source of the right to change the Constitution? Does it come from the Constitution itself or does it come from a source outside the Constitution? The answers to these questions will determine the meaning of the convention to Americans today ... is it revolutionary or can it be controlled?

HISTORICAL ROOTS OF THE CONVENTION

We can understand the controversy over the power of the amending convention by tracing its development in the American revolutionary and constitutional traditions.

The Convention and Revolution

In the American revolutionary tradition, set forth in the Declaration of Independence and the writings of 18th-century republican agitators, the popular constitutional assembly was the most basic expression of the people's supremacy over the governing body.

> *Government has no right to make itself a party in any debate respecting the principles or modes of forming, or of changing, Constitutions. It is not for the benefit of those who exercise the powers of government that Constitutions, and the governments issueing from them, are established. In all these matters the right of judging and acting are in those who pay, and not those who receive.* (Thomas Paine, The Rights of Man)

Paine's distinction between the day-to-day governing body and the principles underlying government was a very important one to the framers of the American Constitution. It challenged the traditional relationship between the ruler and the ruled to rest ultimate authority with the people. The revolutionary potential of making the people the supreme authority is nowhere more eloquently expressed than in Thomas Jefferson's Declaration of Independence. To read beyond the famous first lines is to see how the right to join together to realize self-government could become the right to overthrow an existing government.

> *We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with inalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends,* ***it is the right of the people to alter or abolish it, and to institute a new government****, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.* ***But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty to***

> ***throw off such government, and to provide new guards for their future security.*** (Declaration of Independence) (emphasis added)

Americans exercised the right to "institute new government" by mutual consent when they met to frame the state constitutions that overthrew the colonial charters. These first constitutional bodies were indeed revolutionary.

Article V made this revolutionary right part of the Constitution itself. It stands as a constant reminder to government officials that they are bound by the people through the Constitution.

> *The important distinction so well understood in America, between a constitution established by the people, and unalterable by the government; and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of the legislature has resided, has been supposed to reside also, a full power to change the form of the government.* (Federalist #53)

The American Constitution was Supreme Law because it stood above government. By leaving the people with the right to change the Constitution the framers provided defense against "usurpation" and reconfirmed the ultimate authority of the governed.

The Convention and Stability

The founders' inclusion of an amendment provision was also a reaction to the inflexibility of the Articles of Confederation. Article 13 stated:

> *The Articles of Confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration is agreed to in a Congress of the United States, and be afterward confirmed by the legislature of every state.*

While they may not have called themselves "radicals" most of the delegates to the Philadelphia Convention believed that radical changes were necessary to make the Union work. The proposals they made undermined the fundamental law they had pledged to uphold, without requiring the approval of every state to do it.

Their frustration with the Articles could only convince the framers that good government required flexibility and room for growth. An institutional avenue for change acted as a safety valve; desire for reform could be satisfied systematically instead of through revolution. Thomas Paine praised the amending clauses of the state constitutions because of their stabilizing effect.

> *One of the greatest improvements that has been made for the perpetual security and progress of constitutional liberty, is the provision which the new constitutions make for occasionally revising, altering, and amending them.*
> *... The Rights of Man are the rights of all generations of men, and cannot be monopolized by any. That which is worth following will be followed for the sake of its worth, and it is in this that security lies, and not in any conditions with which it may be encumbered. When a man leaves property to his heirs, he does not connect it with an obligation that they shall accept it. Why, then, should we do otherwise with respect to the Constitution?* (*The Rights of Man*)

By institutionalizing the people's right to change parts of the fundamental law, the founders were protecting the Constitution and avoiding future upheavals. In effect, they took the most revolutionary aspect of the new republic and tamed it: the power to call a convention, now part of the law of the land, would also no longer be a radical one.

The Genesis of Article V

The Virginia Plan, submitted by Edmund Randolph to the Philadelphia Convention, contained the first recommendation for an amendable constitution.

> *Resolved, that provision ought to be made for the amendment of the articles of union, whensoever it shall deem necessary; and that the assent of the national legislature ought not be required thereto.*

The purpose of the amending provision was clear: to provide against future upheaval and to keep the legislature in check. But the actual procedure was more difficult to determine. The major question faced by the delegates was whether the power to initiate change should rest with the national or the state governments. They were aware that the power to amend could be as much a weapon against as a protection of liberty.

Until September 10, one week before the Convention approved the Constitution, the framers' position on amendment procedure was not fully formulated. The provision that emerged from final debate was a compromise between those who thought revision should be strictly in the hands of federal government and those who wanted to leave it to the states. While Congress could propose specific amendments, the states could petition for a convention of unspecified powers to consider amendments. The national legislature would not have exclusive control over the Constitution, nor could state governments make specific proposals that might increase their power. In either case, the people would have the final word.

> *The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Consti-*

tution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

The framers made no judgment as to which amending procedure was the better one. But tradition and the language of the Virginia Plan suggest that they considered the need to establish a peaceful way for the people to bypass the national legislature a primary concern. It is also interesting to note that Article VI, which binds officials of the government to uphold the Constitution, leaves the people and their conventions free of such restraint.

> *2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.*
> *3. The senators and representatives before mentioned, and the members of the several state legislatures, and all the executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States* (Article VI).

The "Runaway Convention"?

The Anti-Federalists objected to many of the particulars of the proposed Constitution, but one of their most powerful arguments against it was a challenge to the legitimacy of the Philadelphia Convention itself. The very phrase "We the People," which opened the preamble, offended those who believed that the convention had overstepped its boundaries, and ignored its instruction to the point where it violated the trust of the people and therefore had no right to pretend to speak for them.

The original resolutions calling for a Constitutional Convention backed up the Anti-Federalist argument over legitimacy. Alexander Hamilton made the original suggestion at the Annapolis Convention of 1786, which had been called by Virginia to discuss commercial matters between the states. That convention recommended

> *the appointment of commissioners to take into consideration, the situation of the United States, to devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that*

purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.

This recommendation led to the Congressional resolution that formally mandated and instructed the Philadelphia Convention.

Resolved—that in the opinion of Congress, it is expedient, that on the second Monday in May next, a Convention of delegates, who shall have been appointed by the several States, be held at Philadelphia for the sole and express purpose of revising the articles of confederation, and reporting to Congress and the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

Congress called for a revision of the existing Articles of Confederation. The Convention delivered an entirely new government. Taken on these terms, Philadelphia might be called a "runaway convention". William Grayson, arguing at the Virginia ratifying debates, accused the framers of just that.

How were the sentiments of the people before the meeting of the Convention at Philadelphia? They had only one object in view. Their ideas reached no farther than to give the general government the five per centum impost, and the regulation of trade. When it was agitated in Congress, in a committee of the whole, this was all that was asked, or was deemed necessary.

Not only had the founders violated the Articles' sacred trust, Grayson went on, they were creating "phantoms" to justify their violation.

Since that period, their views have extended much farther. Horrors have been greatly magnified since the rising of the Convention. We are now told by the honorable gentleman (Governor Randolph) that we shall have wars and rumors of wars, that every calamity is to attend us, and that we shall be ruined and disunited forever, unless we adopt this Constitution. Pennsylvania and Maryland are to fall upon us from the north, like the Goths and Vandals of old; the Algerines, whose flat-sided vessels never came farther than Madeira, are to fill the Chesapeake with mighty fleets, and to attack us on our front; the Indians are to invade us with numerous armies on our rear, in order to convert our cleared lands into hunting grounds; and the Carolinians from the South (mounted on alligators, I presume) are to come and destroy our cornfields, and eat up our little children! These, sir, are the mighty dangers which await us if we reject—dangers which are merely imaginary, and ludicrous in the extreme! Are we to be destroyed by Maryland and Pennsylvania? What will democratic states make war for, and how long

since they have imbibed a hostile spirit? But the generality are to attack us. Will they attack us after violating their faith in the first Union? Will they not violate their faith if they do not take us into their confederacy? Have they not agreed, by the old Confederation, that the Union shall be perpetual, and that no alteration should take place without the consent of Congress, and the confirmation of the legislatures of every State? I cannot think that there is such depravity in mankind as that, after violating public faith so flagrantly, they should make war upon us, also, for not following their example.

Publius' reply to these objections was an appeal to the larger duty of the delegates to overcome the restrictions of the Articles in order to secure the happiness of the people. He expressed the revolutionary tradition of the convention: overthrow laws to attain the higher good.

> *... if (the framers) exceeded their powers, they were not only warranted but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed, and that finally, if they had violated both their powers, and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.* (Federalist #40).

Constitutional Convention: The State Examples

The convention has been called the "American style" of Constitution-making, even though there is only one example of a federal Constitutional convention in our history. It gets its reputation from the states where conventions have been used to write and subsequently rewrite many state charters. Thousands of amendments have been proposed and adopted; some state constitutions even require periodic review or revision by convention. The history of these state conventions reveals both the significance and the potential of the people's right to make and remake their fundamental governing document.

- During the formative years of the Union, 1776-98, eleven of the thirteen original states wrote and revised a total of twenty-one Constitutions. (Rhode Island and Connecticut kept their colonial charters until 1818 and 1842, respectively.) These early state constitutions contained the seeds of the federal republic, for time and again the founders turned to them for guidance.
- The trend in pre-Civil War America was toward creating more democratic state constitutions. Conventions extended popular sovereignty and in some states provided for universal male suffrage. State judges, executive branch officials and even the

prison inspector of New York became subject to election. Conventions were clearly being used to control the power of state governments and to assert the power of the people, as a statement from the Illinois Constitutional Convention of 1847 demonstrates.

> *We are here, the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—"We are the state." We can trample the constitution under our feet as waste paper, and, no one can call us to an account save the people.*

- The major conflicts of the Civil War and Reconstruction period were, to some extent, played out in the state conventions held during 1860-1880. The secession and union of the confederate states was accomplished by conventions, as was their initial restoration to the Union. The Reconstruction Congress imposed strict requirements on the Southern states to revise their constitutions to reflect federal policy. In reaction against this, state conventions of the 1870's re-revised their constitutions to return power to the state governments. State constitutions in the north also reflected changing attitudes towards the central government. Initially supportive of the activist role the government took in engineering social change, by the 1870's northern states were calling conventions as a reaction against activist government policy.
- By the late 19th and early 20th centuries, an increasingly diverse population made it more difficult for a convention to reflect a popular mandate, and fewer states looked to the convention method of proposing amendments. In an interesting contrast to the democratizing trends of the early 19th century, conventions of this period instituted restrictions on suffrage such as the poll tax and some even refused to submit their proposals to the electorate for approval.
- In recent years, state constitutional revision has taken alternate routes. While there have been several conventions, the interpretation of the Courts, legislative alternatives, Governor's commissions and mechanisms such as the initiative and referendum have proven more successful in securing change.

The Unanswered Questions

James Wilson of Pennsylvania summed up the framers' accomplishment when he described the chief merits of the amendment clause to the ratifying convention.

> *This revolutionary principle—that, sovereign power residing in the people, they may change their constitutional government whenever they please—is not a principle of discord, rancour, or war: it is a principle of melioration, contentment, and peace.*

The framers may have tamed the revolutionary right, but they left a myriad of troublesome questions buried within Article V. James Madison pointed this out at the Philadelphia Convention when it considered the article in September 1787. How was a convention to be formed? What would be the force of its acts? he asked.

But the delegation never addressed the vagueness of the provision to "call a convention for the purpose," leaving it to future generations to clarify. Debate has raged over what exactly the framers intended—how much change they wanted to open the Constitution to, and whether they would have approved of the prospect of another convention. The controversy stems from what is unspoken in Article V: Congress has the duty to call the convention when petitioned, but can Congress control it in any way? Important questions come up every time a movement to call a convention gains momentum.

- Can Congress limit the convention to an agenda of proposals specified in the state petitions?
- How will delegates to a convention be chosen and who will set the procedures for choosing them?
- How long does a state's petition for a convention remain valid and can a state rescind its petition?
- Once a convention is called, does it have the power to set its own rules and if so, is it accountable to anyone?

The answers to these questions are far from clear, but it is clear that they would have a great effect on whether the convention is indeed a "principle of melioration, contentment and peace" or one of revolution. Can a constitutional right subvert the Constitution itself?

A CONVENTION: HISTORICAL PRECEDENTS

Those who are anxious over the prospect of a convention ask—what would the people do if given free reign over our basic charter? Would they get rid of the Bill or Rights? Limit the Supreme Court? Install "tyranny of the majority"? Examples from the past do more to fuel the arguments of convention opponents than they do to quell the fears of the skeptics, for the convention has historically been associated with times of upheaval, sectionalism and, eventually, disunion.

- The Philadelphia Convention went far beyond the instructions of the Continental Congress to rewrite entirely the basic charter of government.
- Anti-Federalist agitation during the ratification debates almost prevented ratification. Some Anti-Federalists called for a second convention to rewrite the proposed Constitution even before it was adopted. Anti-Federalists from Virginia proposed: "That a convention be immediately called . . . with full power to

take into their consideration the defects of this constitution that have been suggested by the state conventions . . . and secure to ourselves and our latest posterity the great and inalienable rights of mankind." Advocates of a second convention to secure the addition of the Bill of Rights applied steady pressure to the first Congress until it passed and the states ratified the first ten Constitutional amendments in 1792.

- Still rankled over the "expansionist" policies of the Republican administration of Thomas Jefferson and the Louisiana Purchase in particular, Federalist Josiah Quincy called for a convention to initiate secession in Massachusetts in 1811. Federalist agitation reached its peak in 1815 when representatives from the New England states gathered at the Hartford Convention to discuss mutual grievances over the conduct of the War of 1812 and Republican embargo policies. Although the only action of the Hartford rebels was to propose Constitutional amendments designed to protect the states' economic and political interests, secession was definitely an issue.
- Federal economic policy again provoked near secession in the 1830's, when a South Carolina convention issued a nullification proclamation to signal its protest over tariffs of 1828 and 1832. In an extreme interpretation of states' rights doctrine, the radical convention claimed the right to declare null and void federal laws which "assumed undelegated powers," and were contrary to the interests of its citizens.
- A South Carolina convention again took the radical lead in 1860 when it assembled to rescind the act of the original ratifying convention.

> *We the people of South Carolina in convention assembled do declare and ordain and it is hereby declared and ordained that the ordinance adopted by us in convention on the twenty-third of May in the year of our Lord one thousand seven hundred and eighty-eight whereby the Constitution of the United States of America was ratified and also all acts and parts of acts of the General Assembly of this state ratifying amendments of the said Constitution are hereby repealed; and that the union now subsisting between South Carolina and other states under the name of the "United States of America" is hereby dissolved.*

The South Carolina Convention claimed the right to empower as well.

> *. . . the State of South Carolina has resumed her position among the nations of the world as a separate and independent state with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.*

- On February 4, 1861, delegates from the seceded states assembled in a Constitutional convention in Montgomery, Alabama. They unanimously adopted the constitution of the Confe-

deracy on March 11, 1861, which was very similar to the United States Constitution but was easier to amend: three states could petition for a convention on a specific agenda of amendments and two-thirds of the states were required for ratification.

FROM CONSTITUTIONAL RIGHT TO CONSTITUTIONAL THREAT

More than 300 state petitions calling for an amending convention have been submitted since 1789, most of them during the 20th century. The earliest petitions called for a general convention, but the majority have called for specific amendments, ranging in subject from anti-polygamy measures after Utah was admitted as a state, to the repeal of Prohibition, to structural reforms such as direct election of Senators and the two-term limitation on Presidents. Each new wave of petitions has produced a counter wave of resistance to the convention method of amendment. As resistance has built up, particularly over the past decade, one thing has become clear: the convention is as much a threat as it is a right.

As we move closer to realizing this right to convene we seem to lose the confidence Lincoln exhibited in his first inaugural address.

> *... to me the convention mode seems preferable in that it allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others ...*

Today the prevailing attitude towards a convention is fear—fear that a convention would undermine the very principles of the Constitutional system.

> *... the realistic fact remains that 200 years later there is no certainty that our nation would survive a modern-day convention with its basic structures intact and its citizens' traditional rights retained. The convening of a federal constitutional convention would be an act of the greatest magnitude for our nation. I believe it would be an act fraught with danger and recklessness.* (Melvin Laird, Washington Post, February 13, 1984)

Opponents of calling a convention are apprehensive of what it might recommend. They hesitate to open up the carefully crafted system of checks and balances, the Bill of Rights and minority protections to the whims of a popular forum. And they are generally pessimistic about the power of Congress to control the convention in any way. As Senator Heyburn said in the Senate in 1911, as the movement to call a convention to consider direct election of Senators was gaining ground,

> *When the people of the United States meet in a Constitutional convention there is no power to limit their action.*

They are greater than the Constitution; and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it. (February 17, 1911)

Not everyone believes the Constitution is so vulnerable. Those who fear a convention may be underestimating the American people and their commitment to the basic principles, rights and freedoms of the republic, says Milton S. Eisenhower:

Objections to a constitutional convention called to draft a balanced budget amendment have been more emotional than logical. I know of no reason to expect that delegates to a convention would be any less responsible or committed to upholding our basic liberties than are members of Congress.

Some think there may be more to fear from elected officials than there is to fear from the people. Senator William V. Roth (R-Del.) echoed the Virginia Plan's resolution for an amending device that did not "require the consent of the national legislature" when he called for a general convention in 1979.

(The Constitution) is the living, breathing consensus of American democracy. It not only guarantees the rights of the governed and the process by which their right to be governed is obtained; it also provides the means by which the governed can regain their rights if their representatives govern without their consent.

However, to some opponents, the prospect of a convention threatens more than internal stability. Just as the founders believed they were setting a republican example for the entire world, those who wish to protect it from a general convention might agree with Melvin Laird, who adds to his objections:

If a convention were called, our allies and foes alike would soon realize the new pressures imposed upon our Republic. The mere act of convening a constitutional convention would send tremors through all those economies that depend on the dollar; would undermine our neighbors' confidence in our constitutional integrity; and would weaken not only our economic stability but the stability of the free world. (Washington Post, February 13, 1984)

The Convention as a Tactic

The widespread fear of convention has endowed petition movements with considerable political leverage. In 1912 Congress preferred to pass the 17th amendment rather than face the consequences of the convention petitioned for by the supporters of direct election of the Senate. Other strong petition campaigns were launched to pass the 21st amendment repealing Prohibition and, after FDR's fourth election, in support of the 22nd amendment. In both cases Congress acted before a convention was necessary. The most controversial petition campaigns have

been over the Supreme Court's reapportionment decision in the 1960's, and for the balanced budget amendment, which has 32 petitions before Congress today.

The fear of a "runaway convention" and uncertainty about rules and procedures have persisted as important preventative factors. A Common Cause report of 1979 stated:

> *A Constitutional convention is uncharted political territory. There are no precedents for it except the constitutional convention of 1787, when the Articles of Confederation were thrown out and replaced by the United States Constitution, despite the convention delegates' much more limited mandate. That precedent of wholesale revision of the nation's governing charter raises serious questions about the limits that could bind a second constitutional convention. But state legislators (who have called for a balanced budget convention) appear to have given those implications little thought.*

Balanced budget convention advocates see no basis for these apprehensions. They point to the "seven checks on a constitutional convention" listed by the National Taxpayer's Union in calling the "runaway convention" a "hoax":

1. *Congress could avoid the convention by acting itself.*
2. *Congress establishes the convention procedures.*
3. *The voters themselves would demand that a convention be limited.*
4. *Even if delegates did favor opening the convention to another issue, it is unlikely they would all favor opening it to the same issue.*
5. *The Congress would have the power to refuse to send a non-conforming amendment to ratification.*
6. *Proposals which stray beyond the convention call would be subject to court challenge.*
7. *Thirty-eight states must ratify.*

With the exception of the first and the seventh, these "checks" are all open to question. There are currently no laws to regulate a convention, and some question whether it is valid for Congress to pass regulations at all.

Constitutional Convention Implementation Bills

> *If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We could be running the enormous risk that procedures for a national constitutional convention would have to be forged in a time of divisive controversy and confusion when there would be a high premium on obstructive and result-oriented tactics.* (American Bar Association Report, August 3, 1973).

As the reapportionment and balanced budget petitions climbed closer to the necessary two-thirds level, members of Congress introduced several bills to set rules, regulations and

procedures for a national convention. Hearings were held in 1979. Two major Implementation Acts have been proposed, by Sam Ervin in 1971 and by Orrin Hatch in the 98th Congress. Senator Hatch's bill is an attempt to set the procedure for calling a limited constitutional convention. It features:

- A requirement that state legislatures give their reasons for wanting a convention in specific enough terms to determine whether there is a "consensus" on the need for change but without requiring that all petitions be identical in language.
- A seven-year effectiveness clause for petitions and recognition of the state legislatures' right to rescind petitions.
- Delegate selection would be up to the states, with each state allotted the same number of delegates as it has presidential electors. No member of Congress could be a delegate and delegates would be required to take an oath to comply with the Constitution and the limitations of the convention as called by Congress.
- Congress could refuse to submit proposed amendments to the states if they were contrary to or outside the mandate of the convention.
- Proposed amendments would be subject to judicial review.

While recognizing the power of the states to call a convention for broad unspecified Constitutional revision, Hatch's bill is based on the assumption that Congress does have the power to call and regulate a limited convention if the states specifically request it in their petitions.

> *The constitutional convention, while clearly remaining a unique and separate element of the Government—a new branch of Government, so to speak—is subject to the same limitations and checks and balances as the other, permanent branches of the Government. A constitutional convention, as its name clearly implies, is a constitutional entity; it is appointed under the terms of the Constitution and subject to all of the express and implied limitations imposed by that document.* (Senator Orrin Hatch, statement before the Senate, September 5, 1979)

This assumption is disputed by many legislators and legal scholars. Debates and hearings on implementation bills rarely get beyond the basic point of contention expressed by Walter E. Dellinger of Duke University Law School:

> *... I am persuaded that any Article V convention was intended to be free of the control both of Congress and the state legislatures. One theme that emerges from the Philadelphia debates in 1787 is that Congress should not be given the exclusive authority to propose amendments. Another is the fear expressed by Hamilton and others that state legislatures would propose amendments that would seek to enhance their own power at the expense of the national*

government. The framers of Article V therefore rejected a plan which would have permitted state legislatures to propose particular amendments for ratification. They created instead an alternative amendment free of congressional or state control: a constitutional convention free to determine the nature of the problem, free to define the subject matter and free to compromise the competing interests at stake in the process of drafting a corrective amendment. State legislatures may call for such a convention, but neither they nor Congress may control it. (Testimony, November 29, 1979)

It is difficult to say how, if ever, this debate will be solved, since it rests so heavily on varying interpretations of what the founders intended. Some doubt that Congress will face the issue of convention regulation because that might clear the way to calling one. In the meantime, as legislators confront the very real possibility of having to call a convention, they continually return for some reassurance to the moderate words of Publius in Federalist #43.

That useful alterations (in the Constitution) will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.

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